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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 580

JOHN A. AMBROSE and FRANCES P. HIMMELFARB,
Appellants,

against

DAVID I. WELLS,
Plaintiff-Appellee,

and

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and PERRY B. DURYEA, JR., as Speaker and Presiding Officer of the Assembly of the State of New York,
Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Statement	2
ARGUMENT:	
POINT I—This appeal is not within the jurisdiction of this Court	5
POINT II—Appellants' application to intervene and appeal from the order denying such application are totally premature	6
Conclusion	7

TABLE OF AUTHORITIES

Cases:

American Insurance Company v. *Lucas*, 314 U. S. 575	5
Cobbledick v. *United States*, 309 U. S. 323	5
Golden v. *Zwickler*, 394 U. S. 103	6
Poe v. *Ullman*, 367 U. S. 497	6
Public Service Commission v. *Brashear Freight Lines*, 306 U. S. 204	5
Wells v. *Rockefeller*, 394 U. S. 542	2

STATUTES

15 U.S.C. § 29	5
28 U.S.C. § 1253	5
Federal Rules of Civil Procedure; Rule 24(a)	6
Rules of the United States Supreme Court, Rule 16	1

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, defendants-appellees Nelson A. Rockefeller, Louis J. Lefkowitz, John P. Lomenzo, Malcolm Wilson and Perry B. Duryea,

Jr., joined by plaintiff-appellee, David I. Wells, move to dismiss on the ground that this appeal is not within the jurisdiction of this Court, or, in the alternative, to affirm on the ground that the questions presented by this appeal are so insubstantial as not to require further argument.

Statement

In *Wells* v. *Rockefeller*, 394 U. S. 542, this Court reversed the judgment of the District Court insofar as it approved the congressional districting plan set forth in Chapter 8 of the New York Laws of 1968 for use in the 1970 election and remanded the case for the entry of a new judgment consistent with its opinion.

Upon remand, the District Court entered an order on June 17, 1969 directing the New York Legislature to enact into law not later than January 30, 1970 a congressional districting plan consistent with the opinion of this Court.*

Appellants are two residents of Long Island, New York who, until the time of the above remand from this Court, had not participated in any of the proceedings in this civil action which was first instituted in June, 1966. Appellants first moved to intervene in the above action by the filing of an order to show cause on June 3, 1969. Following the denial of this application on June 10, 1969, appellants renewed their application to intervene by regular notice of motion which was returnable on July 1, 1969 at which time the three-judge statutory Court heard oral argument in the matter.

In arguing for intervention, appellants' counsel asserted that if the New York Legislature drew new congressional lines using 1960 census figures, the residents of Long Is-

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* The order on remand is reprinted in appellants' Jurisdictional Statement, Appendix B.

land would be prejudiced and asked the District Court to set "general guidelines" for the New York Legislature to follow in the drawing of new conggressional lines. Transcript of Hearing, July 1, 1959, pp. 2-9.

At the close of appellants' argument, Circuit Judge Moore, speaking for the three-judge Court, stated (*ibid.*, pp. 9-11):

> "JUDGE MOORE: Your argument, Mr. Armentano, is that practically every sentence is preceded by the word 'if.' You don't know any more than we know what lines the Legislature will draw.
>
> We have and are now only a conduit for the Supreme Court. They have issued an opinion, and they have directed us to tell the Legislature to go ahead in accordance with their opinion.
>
> So far as we are concerned, we are virtually functioning ex officio at this particular time. We have nothing to do. By the same token, you and your clients are not prejudiced in any way, because when, as and if the Legislature draws these new lines, then you can look them over, you can renew your application.
>
> This Court is retaining jurisdiction of course until the Legislature shall have acted. But it is no point for us to speculate as to what the Legislature is going to do when the Legislature hasn't as yet done it.
>
> And as Judge Cannella points out, if they do as they have indicated, hold public hearings, there is no reason why you, your clients or anybody else in the State can not go up and tell them how to do it. But certainly, we can not tell the Legislature in advance of not knowing what they intend to do.
>
> In effect, you are asking the Court to draw lines, and we can't say this should go down one side of Atlantic Avenue in Long Island and up the other side.
>
> Why don't you wait and see? It seems to me your applicant is completely premature at this time.

In other words, you go on the basis that the Legislature is going to use 1960 figures. I can't tell you, and you can't even argue to us that they are going to, because I doubt very much if you can speak for the Legislature any more than we feel that we can.

We are keeping the case open. We are retaining jurisdiction, and of course—so that at this time, we will deny your motion to intervene, but without prejudice when action has been taken.

And if you are agreed, you think yourself aggrieved, you might be completely surprised. You might be the happiest group of people out in Suffolk and Nassau that exist in the State.

And the real aggrieved people might be in the heart of Syracuse, Rochester or up along the St. Lawrence border. We don't know.

So your rights are fully protected by this denial without prejudice to renew your motion when, as and if the Legislature has acted and you have a chance to see what you want to shoot at, if you want to shoot at all.

* * *"

The three-judge Court entered an order on July 1, 1969 denying appellants' Motion for Leave to Intervene "without prejudice to renewal before this Court after the Legislature of the State of New York has acted pursuant to the order of this Court."* Appellants have appealed from this order.

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* The order denying intervention is reprinted in appellants' Jurisdictional Statement, Appendix A.

ARGUMENT

I.

This appeal is not within the jurisdiction of this Court.

Appellants claim that jurisdiction of this appeal is conferred by 28 U.S.C. § 1253 (Jurisdictional Statement, p. 2).

Under 28 U.S.C. § 1253, an appeal to this Court from a three-judge Court must be "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges." The order appealed from does not meet this statutory requirement. That order neither granted nor denied an interlocutory or permanent injunction, but merely denied appellants' application to intervene without prejudice to renew the application after the Legislature has acted pursuant to the order of the District Court.

Since the order of July 1, 1969 did not grant or deny an interlocutory or permanent injunction, it is not directly appealable to this Court. *American Insurance Co.* v. *Lucas*, 314 U. S. 575; *Public Service Commission* v. *Brashear Freight Lines*, 306 U. S. 204.

Appellants also claim that their right to appeal is supported by 15 U.S.C. § 29. However, this section only permits direct appeals in actions in which the United States is a complainant under the anti-monopoly laws and obviously has no applicability to this case.

Appellants' appeal is also defective in that it is not taken from a final order of the District Court, but rather from a denial of an application to intervene without prejudice to appellants' renewal of such application at a future date after the Legislature has enacted a new congressional districting plan. Accordingly, it is not ripe for appellate review. *Cobbledick* v. *United States*, 309 U. S. 323.

II.

Applicants' application to intervene and appeal from the order denying such application are totally premature.

It is fundamental that federal courts may only adjudicate actual controversies and may not issue advisory opinions or decide premature or hypothetical questions. *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969); *Poe* v. *Ullman*, 367 U. S. 497 (1961). In accordance with this policy, the District Court had no alternative but to deny appellants' application to intervene after finding it to be "completely premature." Transcript, p. 10.

In substance, appellants, in moving to intervene, were seeking to challenge a congressional districting plan before it had even been enacted by the New York Legislature or even drafted by a legislative committee. Appellants' threat of injury was based on no more than unsupported predictions as to what the Legislature might do.

Although appellants claim that their application to intervene was based on Rule 24(a) of the Federal Rules of Civil Procedure, they failed to meet the requirements of that rule of showing that their interest might be impaired by the disposition of this action, or that their interest was not adequately protected by the existing parties. Indeed, since their application was made before the enactment of any new congressional districting plan, it would have been impossible for the Court below to determine whether appellants satisfied the requirements of Rule 24(a).

In any event, appellants have not been prejudiced from the order in which they have taken this appeal. The District Court has retained jurisdiction and has permitted appellants to renew their motion to intervene after the Legislature has enacted a new congressional redistricting plan if they believe they have been aggrieved by its provisions.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or in the alternative, the order of the three-judge court of July 1, 1969 should be affirmed.

Dated: New York, New York, October 8, 1969.

Respectfully submitted,

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